SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1190

MILTON BERGER and RUTH K. BERGER, Deceased,
Petitioners,

PENNSYLVANIA PAPYRUS CORPORATION,
Petitioner,

JOSEPH YOVANOVICH and ANNA YOVANOVICH,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OCTOBER TERM, 1968.

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Petitioner,

JOSEPH YOVANOVICH AND ANNA YOVANOVICH,
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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioners hereby petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

I.

OPINIONS BELOW.

The findings of fact and Opinion of the Tax Court (R. 42a)* are reported in 48 T. C. 848 and are printed in Appendix C hereto, *infra* p. 16 app. The Opinion of the Court of Appeals is reported in 404 F. 2d 668, and is printed in Appendix A hereto as originally filed on November 29, 1968 and an amendment thereto by Order Dated December 27, 1968 is also printed in Appendix A, *infra* p. 1 app. Petitioners' Petition for Rehearing and the Court's denial thereof are printed in Appendix D and E hereto, *infra* pp. 28 app, 40 app.

II.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 29, 1968 (Appendix B). On December 13, 1968, petitioners filed a Petition for Rehearing with the Court of Appeals. On December 26, 1968 the Court of Appeals entered its Order denying the Petition for Rehearing. On December 27, 1968, the Court of Appeals entered its Order amending its Opinion of November 29, 1968.

* As used herein, the letter "R" preceding specific page refers to the "Appellants' Appendix" in the Court of Appeals, a certified copy of which together with other copies has been deposited with the Court.

III.

STATEMENT OF QUESTIONS PRESENTED.

Each of petitioners filed a power of attorney (IRS form 2848) on May 19, 1965 with the appropriate Director of Internal Revenue for the taxable years here involved. The designation of mailing address thereon which read "Copies of" correspondence addressed to the taxpayer should be sent to was amended by striking out the words "Copies of" so that the powers of attorney read "correspondence addressed to taxpayers should be sent to" and immediately thereafter in the blank space provided was inserted "Jules I. Whitman, Esq., 2635 Fidelity-Philadelphia Trust Building, 123 S. Broad Street, Philadelphia, Pa. 19109".

On June 3, 1966, the Commissioner mailed statutory notices of deficiency to each set of petitioners to the addresses set forth on their tax returns (not to the address in the powers of attorney).

The Tax Court dismissed petitioners' petitions for lack of jurisdiction on the ground that the petitions were filed more than ninety days after the notices were mailed and denied petitioners' motions to dismiss for lack of jurisdiction on the ground that the notices of deficiency were not validly issued under Section 6212(b) of the Internal Revenue Code. The Court of Appeals affirmed the Tax Court. Therefore, the questions presented are:

A. (1) Whether the statutory notices of deficiency were mailed to the "last known address" of each petitioner within the meaning of Internal Revenue Code Section 6212(b)(1) and (2)?

(2) Whether the Court of Appeals, after acknowledging that the Tax Court made no express finding as to

whether the notices were sent to the "last known address", properly assumed such finding to be implicit in the Tax Court's Opinion and, further, whether such an assumption not premised on any finding may then be affirmed on the purported authority of *Commissioner v. Duberstein,* 363 U. S. 278, 291 (1960)?

B. Whether the statutory notices of deficiency were validly issued under Internal Revenue Code Section 6212(b)(1) and (2) even though not mailed to the "last known address", merely because they were ultimately received by the respective petitioners in time to file petitions with the Tax Court?

C. Whether, as contended by petitioners, the petitions filed with the Tax Court should have been dismissed for lack of jurisdiction on the ground that the statutory notices of deficiency were not mailed to the "last known address" and were consequently not validly issued, or, whether as contended by respondent and determined by the Tax Court and the Court of Appeals, the petitions should have been dismissed for lack of jurisdiction as not timely filed.

IV.

STATUTE INVOLVED.

The relevant provision of the Internal Revenue Code of 1954, 26 U. S. C. § 6212, is as follows:

"Sec. 6212. Notice of Deficiency.

"(a) In General—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

"(b) Address for Notice of Deficiency.—

"(1) Income and Gift Taxes—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A or chapter 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

"(2) Joint Income Tax Returns—In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary or his delegate has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail to each spouse at his last known address."

V.

STATEMENT OF THE CASE.

The facts were fully stipulated and were also found by the Tax Court (R. 43a-52a, incl.). They may be briefly summarized for purposes of this petition as follows:

On May 19, 1965, photostatic copies of a power of attorney on behalf of each petitioner covering the years here involved were filed with the District Director at Newark, New Jersey and were made a part of each case file (R. 5a, 6a, 44a). These were the only powers filed and remain in full force and effect (R. 45a).

Each power of attorney was on Internal Revenue Service Form 2848 and each form contained the printed provision "Copies of correspondence addressed to the taxpayer in proceedings involving the above matter(s) should be sent to:". In each of the three powers of attorney, the words "Copies of" were stricken, so that the instruction read: "correspondence addressed to the taxpayer in proceedings involving the above matter(s) should be sent to:", and immediately following the colon there was inserted the following: "Jules I. Whitman, Esq., 2635 Fidelity-Phila. Trust Bldg., 123 S. Broad Street, Philadelphia, Pa. 19109". In each of the powers Jules I. Whitman and Richard L. Levy, of the same address, and Milton Berger, 2200 Girard Trust Building, Philadelphia, Pennsylvania, were designated as attorneys-in-fact.

In the Protests filed for petitioners their home and business (for Pennsylvania Papyrus) addresses were set forth, however, this was in accordance with the printed Treasury Department Instructions sent to petitioners (R. 46a). These same addresses were contained in the various Form 872 Consents to extend the statute of limitations (R. 47a) but in each case, except once in March of 1966 (R. 8a)

where mailing was made to Berger's office address (Berger was also co-counsel) (R. 45a), the unexecuted consents were mailed to Whitman's address as directed in the power of attorney. In the one instance when they were sent to Berger, it was at Whitman's own request to expedite matters since he anticipated being away from his office (R. 48a). After that, Whitman twice wrote the Director from his office (R. 9a). In each case the Consents were mailed back to Whitman's address after execution. Out of ten mailings (exclusive of the notice of deficiency) the Commissioner followed the directions in the power of attorney eight times, followed the one oral modification and disregarded the direction in the power of attorney only once (Appendix D, pp. 30, 31 app).

On June 3, 1966, statutory notices of deficiency were sent by certified mail to each petitioner at the address shown on their tax returns (R. 7a, 8a, 9a). *Copies* of such notices were mailed by *ordinary* mail, not certified or registered, to Whitman (emphasis supplied) (R. 10a). All notices of deficiency mailed to petitioners were actually received by them in time to file a petition (R. 48a, 49a) and the copy sent to Whitman by ordinary mail was received in the ordinary course of the mails.

No action was taken which could be considered as a waiver of the Commissioner's mailing the notices to other than the last known address of each petitioner. Each of the petitions was filed with the Tax Court ninety-eight days after the mailing of the notices of deficiency (R. 50a). Both parties moved to dismiss for lack of jurisdiction; the respondent because the petitions were out of time; the petitioners because the notices of deficiency were invalid since they were not mailed to taxpayers' "last-known address" as required by IRC Sec. 6212(b) (R. 50a). The Tax Court granted respondent's motion and denied petitioners' motion and the Court of Appeals affirmed the Tax Court.

VI.

REASONS FOR GRANTING WRIT.

A. There Is a Conflict Between the Court of Appeals for the Third Circuit and Other Circuits on Both of the Basic Issues Here Presented.

As heretofore noted under Questions Presented, there are two basic issues present in this case, to wit:

First: Were the statutory notices of deficiency mailed to the "last-known address" under IRC Sec. 6212(b)(1) and (2), where the Internal Revenue Service ignored the clear unequivocal mailing direc[redacted] contained in the respective powers of attorney filed with it and made a part of its case records, and,

Second: Assuming the notices were not mailed to the last-known address may they be deemed validly issued under IRC Sec. 6212(b) because ultimately delivered, particularly where taxpayer properly contests their validity by a motion to dismiss for lack of jurisdiction, taking no action which could be construed as a waiver of the defect of not mailing to the "last-known address".

1. As to the question of whether the mailings were to the "last-known address" the Court's Opinion is in direct conflict with the Court of Appeals for the District of Columbia, in *D'Andrea v. Comm'r.*, 263 F. 2d 904 (CA DC 1959) and with the Court of Appeals for the Sixth Circuit in *Williams v. Comm'r.*, 264 F. 2d 227 (CA 6, 1959). Both of these cases held where there is a power of attorney on file designating correspondence to taxpayer should be mailed to the attorney's address, that the attorney's address as so designated is the "last-known address" within the meaning of IRC Sec. 6212(b). To the same effect is the published statement of procedure promulgated by the Internal Revenue Service in Rev. Proc. 61-18, 1961-2 C. B. 550.

Further, although not involving a change of address made in a power of attorney, the Court of Appeals is also in conflict with the Court of Appeals for the Ninth Circuit, which, in *DeWelles v. Comm'r.*, 378 F. 2d 37 (CA 9, 1967), unequivocally stated that the most recent instruction which the taxpayer gives to the Internal Revenue Service as to where to send the taxpayer's mail will constitute his last known address. Indeed, despite its attempts to distinguish it, the Court of Appeals is actually in conflict with its own recently reported Opinion in *Expanding Envelope and Folder Corporation v. Shotz,* 385 F. 2d 402 (CA 3, 1967), (See Petition for Rehearing, Appendix D, pp. 34, 35 app).

2. As to the question of whether a mailing not to the last known address is valid where taxpayer contests the validity thereof, the Court of Appeals for the Third Circuit has acknowledged that it is in conflict with various other circuits. In footnote 17 of its Opinion in the instant case (Appendix A, p. 11 app), it concedes that it is in conflict with *D'Andrea v. Comm'r., supra,* and other cases on this second point, and it makes reference to its earlier Opinion in *Delman v. Comm'r.*, 384 F. 2d 929 (CA 3, 1967), cert. den. 390 U. S. 952 (1968) where the Court at p. 933 conceded that the various circuits have not been consistent and that not only does its view (which was dictum only) differ from *D'Andrea v. Comm'r., supra,* but impliedly also with *Maxfield v. Comm'r.*, 153 F. 2d 325 (CA 9, 1946) and *Luhring v. Glotzback,* 304 F. 2d 556 (CA 4, 1962). Further, although the Court did not cite *DeWelles v. Comm'r.* (CA 9, 1967), *supra,* there is also a clear conflict with the *DeWelles* case which, though it found for the Internal Revenue Service on the facts there present, flatly stated at p. 39:

> "The obligations under Sec. 6212 and 6213 are mutual. The Secretary's delegate *must* mail the notice of deficiency to the taxpayer's last-known address; if

he does not, the 90-day period does not run and the Tax Court will not have jurisdiction to determine the assessment." (Emphasis supplied.)

Further, the view urged by the respondent and accepted by the Court of Appeals is at variance with Rev. Proc. 61-18, 1961-2 C. B. 550 which states that notices of deficiency should be mailed to the last known address.

B. This Case Involves an Important Question of Jurisdiction of a Federal Court, the Tax Court of the United States.

The Supreme Court of the United States has previously held that the jurisdiction of the Tax Court is limited and statutory. *Lasky v. Comm'r.*, 235 F. 2d 92 (CA 9, 1956), aff'd per curiam, 352 U. S. 1027 (1957); see also *Louisville Builders Co. v. Comm'r.*, 294 F. 2d 233 (CA 6, 1961).

Petitioners are unaware of any publication of statistics of the total number of notices of deficiency issued. However, it is self-evident that since no assessment may be made without the issuance of a statutory notice of deficiency, IRC Sec. 6213(a), unless the taxpayer has filed a waiver of restrictions, IRC Sec. 6213(d), that the number of deficiency notices issued annually must run into the thousands. Indeed, the Tax Court Docket numbered list of current petitions filed during 1968 shows that in excess of 5,300 petitions were filed with the Tax Court during that year. In addition, numerous notices of deficiency were issued in respect of which no petitions were filed with the Court. There have also been many other recent cases involving mailing of notice of deficiency questions such as: *Paul H. Rechnitzer*, T. C. Memo 1967-55; *Delman v. Comm'r., supra; Expanding Envelope and Folder Corporation v. Shotz, supra; DeWelles*

v. Comm'r., supra; Jack D. Houghton (1967), 48 T. C. 656, app. pend. (CA 9).

It is apparent that the question of the validity of the manner of issuance of notices of deficiency and the consequent jurisdiction or lack thereof of the Tax Court is a question of continuing and recurring importance which should be resolved by this Court, and as to which this Court should furnish some guidance and light.

This unsettled controversy is further heightened by the Commissioner's position that he can ignore his own administrative promulgation concerning this narrow question of jurisdiction, see Rev. Proc. 61-18, *supra*.

C. The Determination of the Question of the Validity of the Statutory Notice Is a Vital Significant Question Not Only in the Area Related to the Tax Court Jurisdiction but Also the Question of Whether and When an Assessment May Be Made, IRC Sec. 6213, and Whether a Valid Notice Has Been Issued Such as to Suspend the Running of the Period of Limitations on an Assessment, IRC Sec. 6503(a).

IRC Sec. 6213 precludes the making of an assessment without the issuance of a valid statutory notice. Accordingly, it is vital that the confusion revolving about this question of whether a statutory notice is valid if not mailed to the last-known address designated by the taxpayer should be resolved.

Under IRC Sec. 6213(a) taxpayers are granted 90 days within which to file a petition with the Tax Court from the mailing of the notice of deficiency. Unless and until the question of whether a valid notice has been issued has been resolved, there can be no certainty whether or when such 90 day period commences to run.

In this regard it is respectfully suggested that the Opinion of the Court of Appeals can only add chaos to this confused area and requires clarification and indeed overruling.

In its Opinion (Appendix A, p. 12 app), the Court stated a valid notice under IRC Sec. 6212 could be hand delivered and, further, that the requirement of a valid notice under Sec. 6212(a) (dealing with the issuance of a notice for ultimate Tax Court jurisdiction) was "permissive" and could not be related to the "mandatory" requirements under Sec. 6213(a). Apparently, under the view of the Court of Appeals a notice may be valid under Sec. 6212(a) though not valid under Sec. 6213(a). The curious result of this peculiar logic would be that a notice may be validly issued for purposes of sustaining Tax Court jurisdiction if a petition is filed (Sec. 6212(a)); yet, the notice may not be valid under IRC Sec. 6213 so as to start the 90-day period running within which a petition may be filed under subsection (a) thereof, or to measure the 90-day period prescribed in Section 6213(c) which permits the assessment of a deficiency if the taxpayer does not file a petition with the Tax Court within the time prescribed in Section 6213(a). Indeed, how would such a petition ever be late if the 90-day period did not commence to run?

Similarly, the Court of Appeals concluded in its Opinion that the notice of deficiency might well be valid for purposes of Section 6212 and yet not valid for purposes of Section 6503(a), which latter section requires the issuance of a valid statutory notice in order to suspend the running of the period of limitations. Again, the incongruity and substantial confusion introduced into this important area of law by the Court of Appeals' Opinion is apparent.

D. A Basic Question Is Presented as to Whether the Statutory Provisions Involved Are Intended to Be Applied Solely for the Benefit of the Commissioner of Internal Revenue as Held by the Court of Appeals or Whether They Are to Receive an Even-Handed Interpretation Without Favoring the Internal Revenue Service and the Collection of Revenue.

The Court of Appeals in its Opinion, Appendix A, pp. 12, 13 app, states

> "* * * Their (taxpayers) claim in effect was that the sword with which he (the Commissioner) had in other cases struck down the rights of taxpayers on technicalities must be now wielded against him in order to insure equal justice—perhaps more accurately described as equal injustice."

The Court indeed did petitioners an injustice in the foregoing quotation. Petitioners do not particularly request either equal justice or equal injustice. They do, however, seek an even-handed application of the law so that if the rules of procedure are rigidly applied against taxpayers they will be applied with equal rigor against the Internal Revenue Service.

In this regard it is respectfully submitted that the Court of Appeals was less than even-handed in exhibiting concern that the law should be interpreted so as to protect the Commissioner against the running of the period of limitations, Appendix A, p. 8 app. Such concern should have been irrelevant to an interpretation of the statute. The Court of Appeals ought to concern itself with the law and not the collection or loss of revenues under the peculiar facts of each case. Compare this to the even-handed language of the Court of Appeals for the Ninth Circuit in *DeWelles v. Commissioner, supra*, which stated at page 39:

> "The obligations under § 6212 and § 6213 are mutual. The Secretary's delegate *must* mail the notice of deficiency to the taxpayer's last known address; if he does not, the 90-day period does not run and the Tax Court will have no jurisdiction to determine the assessment. J. W. Haeberlin, 34 T. C. 58 (1960)". (Emphasis supplied.)

The Court of Appeals for the Third Circuit has in effect incorrectly held that the Commissioner may do as he pleases, regardless of the statute, just so long as the taxpayer gets the notice of deficiency, but that the taxpayers may have taxes assessed against them where the Commissioner follows the statute whether he has been fair and reasonable or not.

The Court of Appeals has improperly rewritten the statute so that last known "address" now means last known "addresses". He had done this by holding that any address to which the Commissioner could reasonably believe the notice should be mailed is a last known address, even though by its own standards more than one address might be reasonable, Appendix A. pp. 6, 7 app.

E. The Court of Appeals in Determining That the Notices of Deficiency Were Mailed to the Taxpayers' Last Known Address Made Findings of Fact Totally Without Support in the Record and Misapplied This Court's Opinion in Comm'r. v. Duberstein, 363 U. S. 278, 291 (1960).

In its Opinion, Appendix A, p. 8 app, the Court acknowledged that the Tax Court had made no express finding that the original notices of deficiency were sent to the statutory last known address. It then concluded that such a finding was implicit in the Tax Court's Opinion. To the contrary, no such finding was implicit in the Tax Court's Opinion (Appendix C). Indeed, it would appear that the

Tax Court deliberately avoided ruling on that point, preferring to simply hold that the notices were validly issued. The Court then compounded its error by asserting that under the case of *Comm'r v. Duberstein, supra,* it should sustain this implied finding. The *Duberstein* case cannot be used as an authority for making such a finding of fact, particularly in a fully stipulated case where there is no question of fact present and where the lower court has made no finding of fact on the point.

Further, the Court in its Opinion in order to buttress its conclusion that the notices were mailed to the last known address, specifically found that:

> "* * * The Commissioner ignored the effect of the alteration in the power of attorney."

Appendix A, pp. 5, 14 app. It is important to note that the Court's Opinion originally read:

> "* * * The Commissioner consistently ignored the effect of the alteration in the power of attorney."

The word "consistently" was stricken by the Court's amendment to its Opinion filed on December 27, 1968. This occurred only after the petitioners in their Petition for Rehearing Appendix D, pp. 30, 31 app, pointed out that out of ten mailings only one did not follow the directions in the power of attorney (except in one further instance where a temporary different oral instruction given by petitioners' counsel was followed).

It is submitted that the Court's Amendment to its Opinion recognized the validity of the point made by the petitioners in the Petition for Rehearing. However, the change made by it was totally meaningless and resulted in a prejudicial and erroneous statement of fact as misleading as the original statement. Indeed, it may be even more misleading after the elimination of the word "consistently" than it was before.

The Court made a further misstatement of fact when it stated that Petitioners' counsel and petitioners never complained of the one failure to comply with the power of attorney, Appendix A, p. 7 app. In fact, as set forth in more detail in petitioners' Petition for Rehearing, Appendix D, p. 31 app, the only fact of record bearing on this question was very precisely stipulated and was simply that no "written" complaint was made (R. 7a, 8a).

Petitioners are aware that a Petition for Certiorari is not the place to re-argue the Opinion below, and, therefore, but briefly, wish to note that the erroneous findings unsupported by the record are not limited to the above instances but that there were two other instances of findings also unsupported by the record on this same point, which were set forth and amplified in petitioners' Petition for Rehearing, Appendix D, pp. 32, 33 app.

In summary, the Commissioner's conclusion that the notices were sent to the last known address is largely dependent on findings of fact having no basis in the record or in the opinion of the trial court.

CONCLUSION.

For the reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 17107, 17108, 17109

MILTON BERGER AND RUTH K. BERGER (DECEASED),
Petitioners in No. 17107

PENNSYLVANIA PAPYRUS CORPORATION,
Petitioners in No. 17108

JOSEPH YOVANOVICH AND ANNA YOVANOVICH,
Petitioners in No. 17109

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Argued September 26, 1968

Before BIGGS, FREEDMAN and VAN DUSEN, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 19, 1968)

FREEDMAN, *Circuit Judge*

These three appeals, which were consolidated for argument here as they were at the trial in the Tax Court, present

two questions for consideration. One is whether the notices of income tax deficiency which the Commissioner sent to the taxpayers were directed to the statutory "last known address", and the other is whether the notices were in any event effective because the taxpayers and their designated attorney admittedly received them in the regular course of the mail.

The problems presented grow out of § 6212 of the Internal Revenue Code of 1954 which provides for notice of a deficiency in income tax:

> "§ 6212. Notice of deficiency
>
> "(a) In general.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed [on income] . . . , he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.
>
> "(b) Address for notice of deficiency.—
>
> "(1) Income and gift taxes.—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed [on income] . . . . , if mailed to the taxpayer at his last known address, shall be sufficient . . . even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence."

I.

The Internal Revenue Service questioned the tax treatment in the 1960, 1961 and 1962 income tax returns of Pennsylvania Papyrus Corporation,[1] Milton and Ruth K. Berger and Joseph and Anna Yovanovich of alleged royalty pay-

1. The corporation's returns were for the fiscal years ending April 30, 1961, 1962 and 1963.

ments made by the corporation to the individuals. On April 30, 1965, the District Director of Internal Revenue at Newark, New Jersey, mailed so-called "30-day letters" regarding the controversy to the taxpayers at the addresses given on their returns.[2] On May 18, 1965 Jules I. Whitman, Esquire, wrote to the Service that he had been retained as attorney for the taxpayers and requested an extension of time for filing a protest because he had been unable to obtain all the necessary information. Mr. Whitman enclosed copies of powers of attorney executed by the taxpayers designating him as their attorney. In the printed form, supplied by the Internal Revenue Service,[3] the words "Copies of" were stricken out of the sentence reading: "Copies of correspondence addressed to the taxpayer in proceedings involving the above matter(s) should be sent to:", and Mr. Whitman's name and office address were typewritten in to complete the sentence.

The Service granted the requested extension of time, and when the protests were filed the names and addresses of the taxpayers were stated as they had been given in the income tax returns for the years involved. Thereafter on September 24, 1965, the District Director sent notices of the time and place of a conference to the taxpayers at the addresses given on their returns. On the same day the District Director sent Mr. Whitman copies of these letters together with a form letter [4] which read: "As authorized in a power of attorney on file, we are forwarding; for your information, the enclosed copy of a letter of this date addressed to the taxpayers named below." On a number of

2. Mr. and Mrs. Berger had given as their address "Oak Lane Manor Apartments, Melrose Park 26, Pennsylvania". Mr. and Mrs. Yovanovich had given their address as "1415 Orchard Way, Rosemont, Pennsylvania". Pennsylvania Papyrus Corporation had given as its address "650 Delaware Avenue, Camden, New Jersey."

3. Internal Revenue Service Form 2848 (Mar. 1964).

4. Internal Revenue Service Form L-146 (5-65).

occasions thereafter the taxpayers executed consents to extend the period of the statute of limitations.[5] In several instances these forms were sent directly to Mr. Whitman for execution by the taxpayers and on one occasion they were sent to Mr. Berger at the request of Mr. Whitman, who expected to be absent from his office.

On March 11, 1966, Mr. Whitman wrote the Service that he did not wish the cases to be forwarded for consideration by the appellate division and went on to say: "Under the circumstances, it is my understanding that you will now proceed to cause statutory notices of deficiency (90-day letter) to be issued. . . ." On June 3, 1966, the District Director sent the deficiency notices to the taxpayers by certified mail at the addresses given on their income tax returns for the years involved and sent copies by ordinary mail to Mr. Whitman accompanied by a form letter identical to that of September 24, 1965. The taxpayers and Mr. Whitman received these notices in the regular course of the mail.[6]

On September 9, 1966, the taxpayers filed petitions for redetermination in the Tax Court. The Commissioner moved for dismissal on the ground that the petitions were not filed within the ninety-day statutory period,[7] and the

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5. Internal Revenue Service Form 872.

6. At some time earlier Mrs. Berger had died and Mr. Berger had moved from Melrose Park to Philadelphia. The deficiency notice regarding Mr. and Mrs. Berger's joint tax returns was addressed to: "Estate of Ruth Berger, Dec'd, Milton Berger, Surviving Spouse," and since Mr. Berger had not informed the Service of his removal to Philadelphia, the notice was sent to his old address in Melrose Park. However, the letter was delivered to him at his new address.

7. The taxpayer's petition must be filed in the Tax Court within ninety days from the date of the mailing of a valid deficiency notice. 26 U. S. C. § 6213(a).

See Boccuto v. Commissioner, 277 F. 2d 549 (3 Cir. 1960), where a notice of deficiency mailed by registered mail to the last known address of the taxpayer on November 13, 1958, but returned undelivered was handed to the taxpayer at the Internal Revenue Service office on

taxpayers filed a countermotion for dismissal for lack of jurisdiction because of the alleged invalidity of the deficiency notices.[8] The Tax Court granted the Commissioner's motion to dismiss and denied the taxpayers' countermotion, holding that the deficiency notices were valid and the petitions therefore were filed beyond the statutory period.[9]

II.

In dealing with these taxpayers the Commissioner consistently ignored the effect of the alteration in the power of attorney, either because he interpreted the power as permitting him to continue to communicate directly with the taxpayers and to send copies to their attorney, or because he decided that the alteration was an impermissible change in the prescribed form,[10] or simply because the employees in the busy Internal Revenue Service did not notice that the words "Copies of" had been lined out. The taxpayers contend, however, that the notices of deficiency could properly be sent only to Mr. Whitman and that this had to be done by the use of certified or registered mail. Since Mr. Whitman was sent only copies and these by ordinary mail, they claim the notices mailed to him were doubly inadequate and therefore ineffective. On the

January 21, 1959, and he signed a receipt showing that the delivery on that date was an effort to carry forward the notice mailed on November 13, 1958. We held that the notice was given on November 13, 1958 and that the 90-day period for filing a petition for redetermination with the Tax Court ran from that date. Compare Tenzer v. Commissioner, 285 F. 2d 956 (9 Cir. 1960).

8. See Joseph Delman, T. C. Memo 1966-59, reversed on other grounds, Delman v. Commissioner, 384 F. 2d 929 (3 Cir. 1967), cert. denied, 390 U. S. 952 (1968); John W. Heaberlin, 34 T. C. 58 (1960).

9. 48 T. C. No. 81, September 19, 1967.

10. See Note 12, infra.

other hand, they claim that although the originals were sent to them directly by certified mail, they were ineffective because they were not sent to the "last known address" of the taxpayers, which by virtue of the power of attorney was Mr. Whitman's office address.

The taxpayers rely heavily on Expanding Envelope and Folder Corporation v. Shotz, 385 F. 2d 402 (3 Cir. 1967), where we held that notices of deficiency were validly sent to the taxpayers in care of their attorneys-in-fact at the attorneys' addresses given in the powers of attorney. The taxpayers in that case had stricken out of the same form of power of attorney the words "Copies of" and inserted the word "All". We rejected the taxpayers' contention that the address of the attorneys given in the powers was not the "last known address" within the meaning of the statute and that the words "All correspondence addressed to the taxpayers" were not sufficiently broad to include a notice of deficiency. The essence of the decision there was, as we said in our per curiam opinion: "When the taxpayers deleted the words 'copies of,' relating to correspondence and substituted the word 'all,' they became bound by their actions." 385 F. 2d at 404. The two cases are clearly different. There the taxpayers were barred from complaining of the notice which followed their own instructions. It would be quite different, however, to require the Commissioner to follow the instructions in the power of attorney to the exclusion of all other information which sheds light on the determination of the address to which notice should be sent.

The Internal Revenue Service is often presented with more than one address for a taxpayer, and where in the course of dealings between the Commissioner and the taxpayer, letters are successfully sent to different addresses, it is unreasonable to assume that one and not the other of

the addresses is the "last known address" for the purpose of giving the deficiency notice. For this reason in Delman v. Commissioner, 384 F. 2d 929 (3 Cir. 1967), cert. denied, 390 U. S. 952 (1968), we accepted the view that the last known address is an address to which the Commissioner in all the circumstances may reasonably believe the taxpayers wish the notices sent.[11]

In the circumstances of this case, it cannot be said that the alteration of the powers of attorney amounted to a direction that no letters or even formal documents such as notices of deficiency could be addressed to the taxpayers themselves.[12] The actions of the parties indicate that they did not consider the altered form of power of attorney to have this effect. The Commissioner never responded to the alteration and Mr. Whitman and the taxpayers never complained that there had been a failure to comply with the power of attorney when letters were sent to the taxpayers directly with copies to Mr. Whitman. When on March 11, 1966 Mr. Whitman decided against

11. We recognized in *Delman* that there has been no consistent judicial approach to determining what constitutes a "last known address". However, we there said that the "spirit of the Act" would dictate acceptance of the view that "notice complies with the statute if it is sent to the address where the Commissioner reasonably believes the taxpayer wished to be reached". 384 F. 2d 929, 932, citing Clark's Estate v. Commissioner, 173 F. 2d 13 (2 Cir. 1949). In *Delman* we pointed out that the Service was faced with two "equally suitable" addresses. Cf., D'Andrea v. Commissioner, 263 F. 2d 904 (D. C. Cir. 1959); Maxfield v. Commissioner, 153 F. 2d 325 (9 Cir. 1946).

12. The Tax Court was of the opinion that the instructions accompanying this form forbade the deletion of the words "Copies of". We need not determine whether this view is correct. The Commissioner might have refused to recognize or accept the powers of attorney on the ground that they had been improperly altered, if such was his view. He might have accepted the powers of attorney but refused to recognize their alteration. Finally, even if he accepted the powers of attorney and recognized the alteration, he might have asserted the right to consider it as supplementing the addresses of the taxpayers to which he could continue to send notices.

appellate division consideration of the controversy and wrote that the Service should now proceed to issue the deficiency notices, he gave no indication of any disagreement with the manner of giving notice which the Service had already followed. Instead the taxpayers waited until the expiration of the ninety-day period and then filed a petition for redetermination which in their view of the law should have been dismissed for lack of jurisdiction. Thus, by remaining silent they would allow the clock to continue running although the Commissioner thought it had been stopped by the deficiency notices, and they would enjoy immunity from deficiency assessments because of the bar of the statute of limitations.

The Tax Court made no express finding that the original notices of deficiency were sent to the statutory last known address, but such a finding is implicit in its decision. In the circumstances we cannot say that such a conclusion was clearly erroneous. See Commissioner v. Duberstein, 363 U. S. 278, 291 (1960); Yara Engineering Company v. Commissioner, 344 F. 2d 113 (3 Cir. 1965).

III.

Even if it could be said that the notices of deficiency were not sent to the taxpayers at their last known addresses because the originals should have been sent to Mr. Whitman by certified or registered mail, the notices in this case would still be effective.

We held in *Delman* that § 6212(b)(1) did not render invalid a notice of deficiency which actually was received although the notice was not sent to the address specified in the power of attorney.[13] We said that it was because

13. See Commissioner v. Stewart, 186 F. 2d 239 (6 Cir. 1951); Olsen v. Helvering, 88 F. 2d 650 (2 Cir. 1937); Goolsby v. Tomlinson, 246 F. Supp. 674 (S. D. Fla. 1965). In *Delman*, we alternatively held that the Commissioner's choice of addresses was not unreasonable and that notice was in fact mailed to the last known address.

the statute was written for the protection of the Commissioner that it made the notice of deficiency sufficient if it is sent to the last known address even if the taxpayer does not receive it.[14]

Analysis of appellants' rigidly restricted argument emphasizes the lack of precision in subsections (a) and (b)(1). They are not models of draftsmanship. Literally, subsection (a) merely *authorizes* the Secretary or his delegate to send notice of deficiency by certified or registered mail. It does not *require* him to use certified or registered mail.[15] Moreover, it does not specify the address to which the notice must be directed. Literally read, therefore, subsection (a) would authorize the sending of a notice of deficiency by certified or registered mail to any address which is reasonably applicable to the taxpayer, such as the address listed on his tax return. Curiously, however, subsection (b)(1) read literally makes no requirement in regard to the method of giving notice of deficiency. It merely specifies that if a notice is mailed to the taxpayer at his last known address it is sufficient even if the taxpayer is deceased, or is under a legal disability, or if a corporation, has terminated its existence. There is nothing in this which specifically requires the notice to be sent by certified or registered mail and indeed there is not even an express provision that a notice which is sent to the last known address of the taxpayer shall be sufficient in any cases other than the three specified instances of disability or incapacity.

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14. See, e.g., Brown v. Lethert, 360 F. 2d 560 (8 Cir. 1966); Luhring v. Glotzbach, 304 F. 2d 556 (4 Cir. 1962); Pfeffer v. Commissioner, 272 F. 2d 383 (2 Cir. 1959); Gregory v. United States, 102 Ct. Cl. 642, 57 F. Supp. 962, 973-74 (1944), cert. denied, 326 U. S. 747 (1945).

15. See Boren v. Riddell, 241 F. 2d 670 (9 Cir. 1957).

The statute, however, must be given a sensible reading which makes its provisions workable, a purpose which the draftsmen must be presumed to have intended. With this purpose in mind the meaning of the statute is readily ascertainable.

Subsection (a) authorizes a notice of deficiency to be sent by registered or certified mail. In authorizing such method of notice it does not forbid any other method. If a revenue agent personally delivers by hand a notice of deficiency to the taxpayer it could not rationally be suggested that the notice was invalid because it violated a requirement of subsection (a).[16]

Subsection (b)(1) makes no reference to a requirement of certified or registered mail, but in speaking of the mailing of a notice of deficiency to the taxpayer it must refer to the mailing by certified or registered mail authorized by subsection (a). Since subsection (b)(1) also specifies that such a notice is sufficient if mailed to the taxpayer at his last known address in the exceptional cases which affect the taxpayer's ability to give notice of a change in address, it must intend that the same consequence shall follow from a similar mailing to a taxpayer who is not under a disability. The obvious formula for mailing, therefore, is that the notice be sent by certified or registered mail to the taxpayer at his last known address, and

16. In the original version contained in the Revenue Act of 1924, § 274(a), the provision for notice by registered mail was stated in mandatory form: "the taxpayer . . . *shall* be notified by registered mail [of the deficiency] . . . ." (Emphasis added.) A number of decisions construed the mandatory language of the statute to make any other form of notice inadequate. See Heinemann Chemical Co. v. Heiner, 92 F.2d 344, 346 (3 Cir. 1937), and cases there cited. See also Boren v. Riddell, 241 F. 2d 670, 671-72 (9 Cir. 1957). In the Revenue Act of 1926, § 274(a) this language was changed to its present form in which the Commissioner is "authorized" to use registered mail. Authorization to use certified mail was added in the Technical Amendments Act of 1958, § 89(b).

when this is done the notice is adequate and effective even though it may later be shown that in fact it was never delivered to the taxpayer.[17]

A deficiency notice, unlike a complaint in a civil action, is not a legal process or pleading even though it is a prerequisite to the subsequent litigation before the Tax Court on a petition for redetermination. It usually marks the culmination of informal discussions and even negotiations between the Internal Revenue Service and the taxpayer following the initial notice of the dispute. If the taxpayer has not actually received the notice of deficiency in time he will be barred from invoking the Tax Court's jurisdiction on a petition for redetermination. This, however, still leaves open to him the alternative remedy of paying the tax and suing for a refund in the district court,[18] a remedy which it has been suggested saves § 6212 from violating due process in cases where the notice of deficiency is not actually received.[19]

In the present case we have the converse of the situation which § 6212 envisaged and in which it protected the Commissioner. Here the Commissioner need not rely on the statutory protection given to a notice which was mailed but not received. Instead he has shown the actual delivery of notice to the taxpayers and their attorney. The statute

17. This illustrates the principle enunciated in *Delman* that the statute was written to protect the Commissioner and makes his notice valid if he complies with the statutory authorization regarding notice even though the taxpayer does not actually receive it. In *Delman* we recognized that cases such as D'Andrea v. Commissioner, 263 F. 2d 904 (D. C. Cir. 1959), run the other way, but refused to follow them in the light of the statutory history to which we referred.

18. 26 U. S. C. § 7422. See Quinn v. Hook, 231 F. Supp. 718 (E. D. Pa. 1964), aff'd per curiam, 341 F. 2d 920 (3 Cir. 1965), describing the framework for review of tax claims.

19. Brown v. Lethert, 360 F. 2d 560, 562 (8 Cir. 1966); Cohen v. United States, 297 F. 2d 760, 772 (9 Cir.), cert. denied, 369 U. S. 865 (1962). See Phillips v. Commissioner, 283 U. S. 589 (1931);

does not make this inadequate merely because it authorizes an alternative mailing of notice which it makes sufficient without proof of actual delivery. The case is no different than it would have been if the original notice had been handed to the taxpayers and a copy to their attorney on their visit to his office. In such circumstances he could rely upon the actual delivery of the notices instead of a mailing in the channel which the statute authorizes and renders valid without regard to actual receipt.

The taxpayers argue that § 6503(a) of the Internal Revenue Code which suspends the running of the statute of limitations on the making of deficiency assessments, "after the *mailing* of a notice under § 6212(a)" [Emphasis added.] is proof that notice of a deficiency must be given by mail in compliance with § 6212(a). We may ourselves add the provision of § 6213(a) which measures the ninety-day period for filing of a taxpayer's petition for reconsideration in the Tax Court as commencing when the notice of deficiency "authorized in § 6212 is mailed". In both instances the statutory language, referring to the mailing of the notice of deficiency, is patterned on the customary rather than the exceptinoal case. We do not believe it reasonable to convert the permissive provisions of § 6212 (a) and § 6212(b)(1) relating to mailing into a mandatory requirement because of the reference to them in § 6503(a) and § 6213(a). Such a reading of the statute would bind a taxpayer who never received a notice sent by registered or certified mail addressed to him at his last known address, but would be ineffective if handed to him personally.

The taxpayers argue that this incongruous result must be insisted upon because the Commissioner has at times held taxpayers to a rigid and technical compliance with statutory requirements. Their claim in effect is that the sword with which he has in other cases struck down the rights of taxpayers on technicalities must now be wielded

against him in order to insure equal justice,—perhaps more accurately described as equal injustice.

The legal problems created by the revenue statutes are proverbially complicated and difficult. Their intricacies result from the vast and complex area with which they deal, aggravated in some instances by artificial rules of substantive law devised to close loopholes unjustly enriching some taxpayers, and in other cases by the effort to make the tax consequences of business and financial transactions more predictable. There is no reason, however, for introducing artificiality into the procedural requirements of the internal Revenue Code. Here there is full scope for an insistence of the simplicity and rationality which long ago found its way into civil procedure. We therefore reject a construction of the procedural provisions of § 6212 which would yield the startling conclusion that a notice given to clients and their lawyer is inadequate even though they received it in due course, simply because the lawyer's copy should have been the original, and the channel of certified mail which was used for the taxpayers should have been used for the lawyer.

We hold, therefore, that the notices of deficiency were adequate and effective and that the Tax Court was justified in dismissing the petitions for redetermination as untimely filed.

The decision of the Tax Court will be affirmed.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 17107, 17108, 17109

MILTON BERGER AND RUTH K. BERGER (DECEASED),
Petitioners in No. 17107

PENNSYLVANIA PAPYRUS CORPORATION,
Petitioner in No. 17108

JOSEPH YOVANOVICH AND ANNA YOVANOVICH,
Petitioners in No. 17109

v.

COMMISSIONER OF INTERNAL REVENUE

Present: HASTIE, *Chief Judge,* BIGGS, KALODNER, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT, STAHL, *Circuit Judges*

ORDER.

The opinion filed in this case is amended by striking out the word "consistently" which appears on page 5, line 4 of the slip opinion.

ABRAHAM L. FREEDMAN,
Circuit Judge.

Date: December 27, 1968

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17109

JOSEPH YOVANOVICH AND ANNA YOVANOVICH,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

(Tax Court Docket No. 5175-66)

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

Present: BIGGS, FREEDMAN and VAN DUSEN, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN,
Clerk.

November 29, 1968.

APPENDIX C.

48 T. C. 848

TAX COURT OF THE UNITED STATES

MILTON BERGER AND RUTH K. BERGER, DECEASED, ET AL.,[1]

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET NOS. 5173-66, 5174-66, 5175-66

Filed September 19, 1967.

The petitioners filed tax returns, protests, and powers of attorney with the respondent designating specific addresses as their own. The powers of attorney directed that correspondence addressed to the taxpayer concerning income tax matters for the years in question should be sent to petitioners' attorney. Deficiency notices were sent by registered mail to the petitioners at the addresses given in the returns, protests and powers and copies of the notices

1. Cases of the following petitioners are consolidated herewith: Pennsylvania Papyrus Corporation, docket No. 5174-66; and Joseph Yovanovich and Anna Yovanovich, docket No. 5175-66.

were sent by ordinary mail to petitioners' attorney. The notices and copies were received by the proper parties in ample time to file a petition. Petitions were filed more than 90 days after the date of the mailing. *Held,* the notices of deficiency were validly issued. *Held, further,* petitions dismissed for lack of jurisdiction.

Jules I. Whitman, for the petitioners.

Leo A. Burgoyne, for the respondent.

OPINION.

TIETJENS, *Judge:* These consolidated proceedings involve income tax deficiencies and addition to tax as follows:

Petitioner	*Docket No.*	*Taxable Year*	*Deficiency*	*Addition to tax Sec. 6651(a)*
Milton Berger and Ruth K. Berger, Deceased	5173-66	1960	$ 1,045.61	
		1961	1,634.80	
		1962	2,579.43	
Pennsylvania Papyrus Corporation	5174-66	4-30-61	5,115.26	
		4-30-62	31,033.22	$7,758.30
		4-30-63	26,135.90	
Joseph Yovanovich and Anna Yovanovich	5175-66	1960	765.97	
		1961	2,562.71	
		1962	5,629.61	

The sole issue is whether the Commissioner validly issued notices of deficiency to the petitioners in accordance with section 6212 of the Internal Revenue Code of 1954.[2]

All of the facts are stipulated, and are so found. The stipulations and exhibits thereto are incorporated herein by this reference.

Milton Berger (hereinafter sometimes referred to as Berger) and Ruth K. Berger filed their income tax returns for the taxable years 1960, 1961 and 1962 with the district director of internal revenue, Philadelphia, Pennsylvania, and set forth their address to be: Oak Lane Manor Apts., Melrose Park 26, Pennsylvania.

Pennsylvania Papyrus Corporation (hereinafter sometimes referred to as Papyrus) is incorporated under the laws of Pennsylvania. Its income tax returns for the taxable years ended April 30, 1961, April 30, 1962 and April 30, 1963, were filed with the district director of internal revenue, Camden, New Jersey, and set forth the address of the cor-

2. All statutory references are to the Internal Revenue Code of 1954.

poration to be: 650 Delaware Avenue, Camden, New Jersey.

Joseph and Anna Yovanovich filed their income tax returns for the taxable years 1960, 1961 and 1962 with the district director of internal revenue, Philadelphia, Pennsylvania, and set forth their address to be: 1415 Orchard Way, Rosemont, Pennsylvania.

On April 30, 1965, the district director of internal revenue at Newark, New Jersey, mailed 30-day letters to each petitioner at their respective address as stated above.

On May 19, 1965, photostatic copies of a power of attorney on behalf of each of the petitioners, covering the years here involved, were filed with the district director of internal revenue at Newark, New Jersey. The petitioners listed their addresses on the powers. These addresses were identical with the ones shown on their tax returns and the 30-day letters. These powers were the only ones filed and still continue in full force and effect.

The form of the power of attorney utilized by petitioners was U. S. Treasury Department-Internal Revenue Service Form 2848 (March 1964).

Each form contained the following printed provision: "Copies of correspondence addressed to the taxpayer in proceedings involving the above matter(s) should be sent to:". In each of the three powers of attorney, the words "Copies of" were stricken, so that the instruction read: "correspondence addressed to the taxpayer in proceedings involving the above matter(s) should be sent to:", and immediately following the colon there was inserted the following: "Jules I. Whitman, Esq., 2635 Fidelity-Phila. Trust Bldg., 123 S. Broad Street, Philadelphia, Pa. 19109." In each of the powers Jules I. Whitman and Richard L. Levy, of the same address, and Milton Berger, 2200 Girard Trust Building, Philadelphia, Pennsylvania, were designated as attorneys-in-fact. This deletion on these powers of attorney

was contrary to the directions on the back of the forms. The instruction concerning the authority delegated stated:

> If this form is used, none of the delegations of authority printed on the face of the form may be deleted. If a limited delegation of authority is desired, Form 2848-A may be used.

These powers were transmitted by letter signed by Jules I. Whitman (hereinafter referred to as Whitman).

Subsequently, protests were filed in each of the three cases, which stated the name and address of the petitioner to be:

> Milton Berger and Ruth K. Berger, Deceased
> Oak Lane Manor Apts.
> Melrose Park 26, Pennsylvania
> Pennsylvania Papyrus Corporation
> 650 Delaware Ave.
> Camden, New Jersey
>
> Joseph and Anna Yovanovich
> 1415 Orchard Way
> Rosemont, Pa.

The addresses in the protests were prepared by the petitioners and conformed with the instructions contained in Internal Revenue Service Publication No. 5. This publication was transmitted to petitioners as an attachment to the 30-day letters. It instructed the individual petitioners to show their residence address, and the corporation, the address of the principal office or place of business.

On September 24, 1965, the district director sent letters (Form L-201) to the petitioners at the same addresses as set forth in the 30-day letters. The purpose of these letters was to arrange conferences between petitioners and

the office of the district director. On the same day the district director sent a letter (Form L-146) to Whitman, transmitting with such letter copies of the letters sent to petitioners. The body of the letter to Whitman stated:

> As authorized in a power of attorney on file, we are forwarding, for your information, the enclosed copy of a letter of this date addressed to the taxpayers named below.

No written exceptions were made to the fact that these letters were mailed to the petitioners rather than to Whitman.

Subsequently, on several occasions the office of the district director at Newark, New Jersey, mailed directly to Whitman Form 872 Consents to extend the period of limitations in all three cases. Each time Whitman procured their execution and mailed them to the district director at Newark, New Jersey, requesting in his letter that an executed copy be returned to him.

All the Form 872 Consents mailed to Whitman utilized the same addresses with respect to the petitioners as were ultimately employed in the 30-day letters, powers of attorney, protests and notices of deficiency.

On one occasion the district director at Newark, New Jersey, mailed Forms 872 in respect to all three cases to Milton Berger at his office. This was done at Whitman's oral request to expedite matters since Whitman anticipated being away from his office.

On June 3, 1966, the Commissioner sent notices of deficiency by certified mail to the various petitioners at the following addresses:

> Estate of Ruth Berger, Dec'd.
> Milton Berger, Surviving Spouse
> Oak Lane Manor Apts.
> Melrose Park 26, Pennsylvania

Pennsylvania Papyrus Corporation
650 Delaware Avenue
Camden, New Jersey

Joseph and Anna Yovanovich
1415 Orchard Way
Rosemont, Pennsylvania

Said notices were received by Papyrus and the Yovanovichs in the ordinary course of the mails, by delivery to the above specified addresses. At the time the notice of deficiency was mailed to Berger, he resided at a new address, Penn Towers Apts., 1801 John F. Kennedy Boulevard, Philadelphia, Pennsylvania. Berger had not informed the respondent of this change. Berger received the notice, at his new address, in ample time so that had he elected he could have filed a timely petition.

On the same day, the Commissioner sent by ordinary mail a copy of the notices of deficiency to:

Jules I. Whitman, Esq.
2635 Fidelity-Philadelphia Trust Bldg.
123 South Broad Street
Philadelphia, Pennsylvania 19109

Each copy of the notices of deficiency was received by Whitman in the ordinary course of the mails.

The copies of the notices of deficiency sent to Whitman were transmitted by a letter to him which stated: "As authorized in a power of attorney on file, we are forwarding, for your information, the enclosed copy of a letter of this date addressed to the taxpayer or taxpayers named below." Each of the notices sent to the petitioners stated: "A copy of this letter and statement has been forwarded to your representative, Mr. Jules I. Whitman, 2635 Fidelity-Philadelphia Trust Building, 123 South Broad Street, Philadelphia, Pennsylvania, in accordance with the author-

ity contained in the power of attorney executed by you."

Each of the petitions giving rise to these proceedings was mailed to the Tax Court of the United States on Friday, September 9, 1966, ninety-eight days after the mailing of the notices of deficiency.

Both parties have moved to dismiss the petitions for lack of jurisdiction: the respondent, because the petitions were out of time; the petitioners, because the notices of deficiency were inadequate since they were not mailed to petitioners' last known addresses within the meaning of section 6212(b)(1), I. R. C. 1954.

Denial of petitioners' motion disposes of the case. There is no contention that the petitions were filed on time. We decided the case by granting respondent's motion and denying that of petitioners.

The basis for this decision should be apparent from a summary of the stipulated facts.

On June 3, 1966, the respondent sent notices of deficiency by certified mail to each petitioner, addressed as follows:

Estate of Ruth Berger, Dec'd.
Milton Berger, Surviving Spouse
Oak Lane Manor Apts.
Melrose Park 26, Pennsylvania

Pennsylvania Papyrus Corporation
650 Delaware Avenue
Camden, New Jersey

Joseph and Anna Yovanovich
1415 Orchard Way
Rosemont, Pennsylvania

These notices were received by Papyrus and the Yovanovichs in the ordinary course of the mails by delivery to the above-specified addresses. At the time the notice of

deficiency was mailed to Berger, he already resided at his present address, Penn Towers Apts., 1801 John F. Kennedy Boulevard, Philadelphia, Pennsylvania. Berger nevertheless received the deficiency notice in sufficient time to file a timely petition in this Court if he had so elected. Berger gave no notice to respondent of this change of address for the purpose of mailing the notice of deficiency. Each of the other petitioners also received the notice in ample time to have permitted them to file timely petitions here. A copy of these notices of deficiency were sent by letter to Whitman, petitioners' attorney, at the address given in the powers of attorney, and received by him.

As in *Bert D. Parker*, 12 T. C. 1079, the only real question is whether the terms of the powers of attorney filed on May 19, 1965, which requested or instructed that correspondence between the respondent and the petitioners involving proceedings in these matters should be sent to their attorney, thereby required the respondent (almost at his peril if he did not) to send every original document to the attorney's address, rather than to the petitioner's ordinary and accepted address for other purposes.

We do not think that the statutory scheme, or even common sense, required respondent to follow that course alone. The petitioners in fact received the deficiency notices by certified mail addressed to the addresses shown on their returns and in the powers of attorney. The attorney received copies of the notices. All this, apparently, was in ample time for them to have filed petitions in this Court. They make no argument to the contrary. The petitioners were not misled in any respect. They did not show they were in any way prejudiced. For all petitioners have proved, they sat by, perhaps deliberately, until after the period for filing petitions in this Court expired, then for some unexplained reason apparently tried to invoke

the Court's jurisdiction by filing petitions, and then subsequently denied the Court's jurisdiction on the ground they had received inadequate or invalid notices of deficienc

Under these facts we conclude that the notices of d ficiency were validly issued. The purpose of the statut provisions is to establish a procedure insuring a high degree of probability that the taxpayer would receive the deficiency notice. *Clement Brzezinski*, 23 T. C. 192; and all facts are to be examined to determine whether this purpose has been fulfilled. See *Langdon P. Marvin, Jr.*, 40 T. C. 982; *Bert D. Parker*, 12 T. C. 1079; *Dolezilek v. Commissioner*, 212 F. 2d 458.

Bert D. Parker, supra, dealt with a situation strikingly similar to the one before us. There the taxpayer had designated one address in their returns as their own and later executed a power of attorney directing that "all correspondence, documents, warrants or other data" in connection with taxation, be sent to their attorney, whose address was also given in the power. The Court said, at page 1081:

> The question presented to us is, therefore, whether, a petitioner having given both his own address and the address of an attorney in a power of attorney, the Commissioner is required to mail the notice of deficiency to the attorney at the address given for the attorney, instead of to the petitioner at his own address * * *.

We answered this question in the negative and dismissed for lack of jurisdiction for late filing.

Among numerous other cases, which we think are distinguishable, petitioners rely on *D'Andrea v. Commissioner*, 263 F. 2d 904, reversing an unreported order of this Court. Why the appellate court decided *D'Andrea* as it

it did is not entirely clear to us, but it appears, first, that there the taxpayer (although the Commissioner might not have known the reason) executed the power of attorney because he intended shortly to move and actually did move. Secondly, the registered letter containing the notice was not delivered to the taxpayer. These factors distinguish *D'Andra* from the present case.

Petitioners also rely on Rev. Proc. 61-18, 1961-2 C. B. 550, which provides that:

> In general, it will be the Internal Revenue Service practice to regard the address of the taxpayer's duly authorized representative as constituting the last known address of the taxpayer within the meaning of section 6212(b) of the Internal Revenue Code of 1954 in cases where, subsequent to the date on which he files a return for the txaable year, or concurrently with such filing, the taxpayer files a power of attorney with the Internal Revenue Service which authorizes the designated attorney to represent him and requests that *all* communications concerning his tax matters with regard thereto, or concerning a proposed deficiency in tax for that taxable year, be mailed to his attorney. at his attorney's address. See *Mary Jo Williams, Administrator, v. United States,* 264 Fed. (2d) 227 (1959) certiorari denied, 361 U. S. 862, and *Marjorie F. Birnie v. Commissioner,* 16 T. C. 861 (1951).
>
> * * *

Whatever sympathy this "In general" statement of practice might elicit for petitioners, we do not think it ties respondent's hands. In the first place, it is not a Regulation. Neither have petitioners shown, if it makes any difference, that they had placed any reliance on the Proce-

dure, to their detriment. Further, the Procedure goes on to say:

> Under different facts and circumstances, a determination as to what is the taxpayer's last known address will still be made on the basis of the particular facts involved, the requirements of section 6212(b) of the Code and the applicable case law. * * *

We think that whether a notice of deficiency has been legally issued remains a question for the Court to determine.

As stated above, we dismiss the petitions on respondent's motion because we hold that the notices of deficiency were legally issued and the petitions were filed after expiration of the 90-day period.

Dismissed for lack of jurisdiction.

APPENDIX D.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NOS. 17107, 17108, 17109

MILTON BERGER AND RUTH K. BERGER (DECEASED),
JOSEPH YOVANOVICH AND ANNA YOVANOVICH,
PENNSYLVANIA PAPYRUS CORPORATION,
Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REHEARING UNDER RULES 40 AND 35.

JULES I. WHITMAN, ESQ.,
2600 The Fidelity Bldg.,
123 S. Broad Street,
Philadelphia, Pa. 19109.

Of Counsel:
RICHARD L. LEVY, ESQUIRE,
DILWORTH, PAXSON, KALISH, KOHN & LEVY,
2600 The Fidelity Building,
Philadelphia, Pa. 19109.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NOS. 17107, 17108, 17109

MILTON BERGER AND RUTH K. BERGER (DECEASED), JOSEPH YOVANOVICH AND ANNA YOVANOVICH, PENNSYLVANIA PAPYRUS CORPORATION,

Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

PETITION FOR REHEARING BY PETITIONERS UNDER RULES 40 AND 35.

Your petitioners hereby petition for rehearing of this case pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and,

Further suggest and request pursuant to Rule 35 thereof that such rehearing be held en banc, and

Further request that the Court reconsider its conclusion and determine that the notices of deficiency were not mailed to each petitioner's respective last known address, and

Further request that in any event the Court's Opinion entered on November 29, 1968 be withdrawn to correct various factual inaccuracies hereinafter related.

STATEMENT OF FACTS AND POINTS TO BE RECONSIDERED.

IN RE: *Section "II" of This Court's Opinion (p. 5-7).*

A. The Court's Opinion Misapprehends and Misstates Certain Relevant Facts Contrary to the Record and in a Manner Prejudicial to Petitioners.

(1) On page 5 of its Opinion, the Court states that "* * * the Commissioner consistently ignored the effect of the alteration in the power of attorney".[1]

This statement is contrary to the record (7a, 8a, 9a, 22a). Actually, after the filing of the power of attorney and prior to the issuance of the statutory notice in question, the Commissioner consistently mailed all correspondence and documents to Whitman's address, except in one instance where it was mailed to Berger's office address (Berger was co-counsel) at Whitman's express request (8a, 9a) and one other instance where a letter to arrange a conference was sent to the respective home addresses of Berger and Yovanovich and the office of Pennsylvania Papyrus (7a, 26a, 27a, 28a). In summary, ten mailings were made by the Internal Revenue Service to Whitman as follows:

To Whitman's Address (including Mailing to Berger's Office at Whitman's Request)*

Letter Extending Protest Time (7a, 21a); 5/28/65
Letter Dealing with Protests (7a, 22a); 8/19/65
Consents Extending Period of Limitations (8a); 10/7/65
Consent Extending Period of Limitation (8a); 10/ /65
Consents Extending Period of Limitations (8a); 1/ /66
Consents Extending Period of Limitations (8a); 3/ /66

1. Referring to the change of address directing the mailing of correspondence to Whitman's address.

Four Mailings of Consents after Execution by Commissioner (9a); various dates

As previously noted, the only prior failure to observe the power of attorney was in one instance in respect of the letters to arrange a conference mailed on September 24, 1965 (7a).

(2) On page 7 of its Opinion the Court states:

> "The Commissioner never responded to the alteration and Mr. Whitman and the taxpayers *never complained* that there had been a failure to comply with the power of attorney when letters were sent directly to the taxpayers with copies to Mr. Whitman." (Emphasis supplied.)

Petitioners have already demonstrated the error of the assertion the Commissioner never responded to the alteration and will not repeat such facts. The statement that they never complained that there was (in the single instance) a failure to comply with the power of attorney is totally without any basis in the record. The only statement contained in the record is that no *written* complaint was made (7a, 8a).

As was pointed out in petitioner's reply brief (6, 7) the only relevance petitioners failure to complain could have would be as an estoppel argument by respondent, and the burden should be on him to demonstrate a failure to complain. Also as noted in said reply brief (7) if any inference were drawn from the subsequent facts it would have to be assumed that respondent was admonished to comply with the power of attorney, since how else can his making all subsequent mailings to Whitman be explained.

(3) On page 7 the Court states that when writing to the respondent to proceed with the issuance of deficiency

notices Whitman "* * * gave no indication of any disagreement with the manner of giving notice which the Service had already followed."

This point is contrary to the facts since there had been no previous "notice" of any sort issued which could have been followed by the Service (as to which taxpayers purportedly gave no indication of disagreement). The stipulation of facts in one place does refer to the letters sent to arrange a conference as notices of conferences (7a, 8a). An examination of these letters indicates they are not notices of anything and are not so referred to either on the form itself or in the transmittal letter to Whitman, whereby copies were sent, where they were simply referred to as letters.

(4) The Court then proceeds on page 7 to state that by waiting for the expiration of the ninety day period to file their petitions, the taxpayers by remaining silent sought to allow the clock to continue running in order to bar the deficiency by the statute of limitations against the Commissioner, who would have thought it had been stopped by the deficiency notices.

The statement of the Court that petitioners waited ninety days and more to cause the statute of limitations to run finds no support whatsoever in any place in the record. There are no facts of record which can even justify any finding that the statute of limitations had run. The only written allegation that the period of limitation ran was contained in the respondent's brief before the Tax Court, referred to at page 14 of petitioner's brief to this Court.

Petitioner's counsel does recall that in response to a question from the bench, he did advise the Court that in fact the period of limitation had run on certain of the years only twenty-seven days after the mailing of the notice of deficiency. If the Court wishes to go outside the record and rely on the oral statement of petitioner's coun-

sel, then it should not make an incorrect finding based upon such statement and it should not imply that the petitioners sat back for more than ninety days in order to permit the period of limitation to expire.

It is assumed that this Court does not take the position that petitioner was under a duty to hasten to file a petition in less than twenty-seven days after mailing in order to attempt to stop the running of the period of limitation. Insofar as other years as to which the period of limitation had not run at the time of the filing of the petition, it would appear that under IRC Section 6503(a)(1) the running of the period of limitation was suspended upon the filing of the petitions.

It is specifically requested that the Court either strike this reference to the running of the period of limitation from its Opinion, or that in the alternative, it direct the parties to stipulate as to the correct facts so that it may make a correct statement of fact in its Opinion.

B. The Legal Reasoning of the Court Was Erroneous and Contrary to the Internal Revenue Code.

(1) On page 5 of its Opinion, the Court dismissed petitioners' reliance on *Expanding Envelope and Folder Corp. v. Shotz,* 385 F. 2d 402 (3rd Cir. 1967), by stating (p. 6) that the essence of the *Expanding Envelope* case was merely that:

> "When the taxpayers deleted the words 'copies of' relating to correspondence and substituted the word 'all' they became bound by their actions."

The Court then said (on p. 6) it is quite different to require the Commissioner to follow the instructions given in the power of attorney.

It is respectfully submitted that the Court has badly misinterpreted its own earlier *Expanding Envelope* Opinion by treating it as nothing more than an estoppel rule. Preceding the quotation from the *Expanding Envelope* case referred to in the instant case, the Court rejected Expanding Envelope's contention that a power of attorney of the taxpayer could not be used to alter the "last known address" requirement and found as follows:

> "We think that when a taxpayer, through a duly executed nad filed power, gives instructions such as those here given, he is in effect giving the Service a last known address for Section 6212 purposes. It is an address where he specifically indicates he is likely to receive the notice."

The immediately foregoing quotation is a flat holding that a power of attorney may be altered and when so altered will effect a change of last known address.

The Court in its Opinion in the instant case, however, incorrectly limits the *Expanding Envelope* case as if it held merely that the taxpayer was bound by what he did in the power of attorney and was estopped to question the change it made on the form.

(2) Interestingly enough, similar to the instant case, other addresses than the one designated in the power of attorney were later used on waivers of limitation forms filed with the Service. In the *Expanding Envelope* case this Court held that the use of such different addresses on the waivers was not evidence from which the Service should have concluded that the taxpayers were revoking the instructions contained in the power. Therefore, the Court's conclusion on page 6 of its instant Opinion which implies that the use of such other addresses in the body of such

forms could be a basis for assuming the taxpayer desired a different address for mailing than that in the power of attorney, is directly contrary to its earlier Opinion in *Expanding Envelope.*

Indeed it is hard to conceive how the Commissioner could possibly have reasonably believed as this Court suggested (p. 6), that petitioners desired their notices of deficiency mailed to any address other than the one stated in the powers of attorney. Moreover, the Court (p. 6) has in effect held there can be more than one last known address and further that what is the last known address is to be determined not as a fact but by the operation of the Commissioner's mind. Both of these conclusions are clearly contrary to IRC Section 6212(b)(1) and (2) which speaks of last known *address* and not last known *addresses* or addresses to which the Commissioner might reasonably think petitioner might like notices sent.

(3) On page 7 (footnote 12) the Court says it is not passing on whether the alteration of the power of attorney form was valid. To this extent it again refused to apply the rule clearly laid down in *Expanding Envelope* and heretofore noted.

(4) On page 7, the Court has misapplied *Commissioner v. Duberstein,* 363 U. S. 278, 291 (1960) and *Yara Engineering Company v. Commissioner,* 344 F. 2d 113 (3rd Cir. 1965) to support a conclusion admittedly not expressly found by the Tax Court but purportedly "implicit in its decision".

With all due respect to this Court, no such "implicit" finding (purportedly that the notices were mailed to each last known address) is present in the Tax Court's 14 page Opinion. Indeed meticulous reading and rereading of that Opinion could just as well lead to the opposite conclusion,

that the Tax Court deliberately avoided ruling on that point, preferring to simply hold that notices were validly issued (similar to this Court's conclusion under Section "III" of its Opinion). Then after indulging in this questionable conclusion, the Court compounds its error and improperly limits the scope of Appellate review *in a fully stipulated case* where there is no question of fact present but only a problem of what the law holds based on agreed facts.

IN RE: *Section "'III" of This Court's Opinion (p. 7-12)*

(1) The Court in its analysis of Section 6212 did not consider that section as a whole although it purported to do so. It wholly ignored the provisions of subsection (b) (2) thereof, which would compel the conclusion that a complete reading of that Section 6212 (even without resort to other sections) can only sustain petitioners' contention that mailing to the last known address is mandatory. It is noted that on pages 5-7, inclusive, of its brief petitioners called the Court's attention to this point and such argument will not be repeated here.

(2) The Court in seeking to protect the Commissioner from technicalities brought upon him by himself, has emphasized that Section 6212(b)(1) was for the Commissioner's protection (9, 10), but it has broadened this protective mantle well beyond the section itself by here holding that there can be more than one last known address. In so doing it has expanded the narrow and singular protective mantle of "last known address" to any address the Commissioner reasonably believes the notice should be mailed to, even though in the context of the Court's Opinion several different addresses admittedly could be reasonable (p. 8).

(3) The Court finds that hand delivery of a notice is adequate (9) and that Section 6213(a) which gives the taxpayer ninety days after "mailing" to file a petition does not convert Section 6212 to require a mandatory mailing (11). This conclusion is wholly untenable and would create an insoluable and ludicrous dilemma. If the notice which was hand delivered or improperly mailed is valid then within what period may a petition be filed and for how long is the Commissioner precluded from making an assessment?

Under Section 6213(a) the time period for both is ninety days from mailing. If the notice is hand delivered does the petitioner have less or more than ninety days? Indeed it may well be that if the Court's rationale is correct that the petition filed in the instant case was not late. Further, if the notice is not mailed as required by Section 6213(a) but is deemed valid under Section 6212 then the Commission will not be able to ever assess the tax because of the Section 6213(a) prohibition. One may then wonder what is the meaning of the Court's holding that a notice can be valid under Section 6212 though invalid under Section 6213(a).

Similarly, the Court found that Section 6503(a) which requires the mailing of the notice to suspend the period of limitations does not make proper mailing mandatory under Section 6212 Here again the Court has opened a Pandora's Box, perhaps in this very case. Indeed if the notice was valid under Section 6212 but not under Section 6503, then, to the extent the period of limitations would otherwise have expired during the ninety day period, the bar of the statute of limitations will indeed have run, notwithstanding that a valid notice may have been issued under Section 6212.

(4) On page 11 the Court states the petitioners seek to achieve not equal justice but equal injustice. The petitioners do not seek either equal justice or equal injustice. However, they do seek an even handed application of the law so that if the rules of procedure are rigidly applied against taxpayers they will be applied equally with equal rigor against the Internal Revenue Service, see *Eocutto v. Commissioner,* 277 F. 2d 549 (3rd Cir. 1960) discussed at page 4 of the Court's Opinion. It is respectfully submitted that this Court's expressed concern with not permitting the period of limitations to run against the Commissioner is irrelevant and improper.

Further, while, as noted by the Court, simplicity in procedural matters may be desirable as in civil procedure (12), the jurisdiction of the Tax Court is limited and statutory and normal concepts of judicial procedures may not be utilized to confer jurisdiction beyond that literally granted by the statute. *Lasky v. Commissioner,* 235 F. 2d 97 (9th Cir. 1956), aff'd 352 U. S. 1027 (1957), see also petitioner's brief, page 12.

REASONS WHY REHEARING SHOULD BE EN BANC.

1. As heretofore noted this Court's Opinion is contrary to its Opinion in *Expanding Envelope, supra* with respect to the question of whether the notices of deficiency were mailed to the last known address of each petitioner.

2. (a) The conclusion urged by petitioners that a notice not mailed to the last known address is defective regardless of receipt is contrary to dicta in an earlier Opinion of this Court, *Delman v. Commissioner,* 384 F. 2d 929 (3rd Cir. 1967) and it would require en banc review for reversal of this dicta.

(b) The conclusion of the Court in the instant case and *Delman, supra,* is contrary to the views of other Cir-

cuit Court of Appeals, (Opinion p. 11, 17); See also pages 7, 8, 9 of Petitioners' Brief.

CERTIFICATE OF GOOD FAITH.

This Petition for rehearing is filed in good faith and not for purposes of delay.

CONCLUSION.

This Court should grant rehearing under Rule 40 and conduct such rehearing en banc under Rule 35.

In the event it does not grant rehearing it should reconsider and reverse its conclusion that the respective notices were mailed to the last known address of each petitioner. Finally, in any event it should correct numerous misstatements made in its Opinion and referred to hereinabove.

Respectfully submitted,

JULES I. WHITMAN,
Counsel for Petitioners.

APPENDIX E.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

Nos. 17107, 17108, 17109.

MILTON BERGER AND RUTH K. BERGER (DECEASED),
Petitioners in No. 17107,

PENNSYLVANIA PAPYRUS CORPORATION,
Petitioners in No. 17108,

JOSEPH YOVANOVICH AND ANNA YOVANOVICH,
Petitioners in No. 17109,

v.

COMMISSIONER OF INTERNAL REVENUE

ORDER

SUR PETITION FOR REHEARING.

Present: HASTIE, *Chief Judge,* BIGGS, KALODNER, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT, STAHL, *Circuit Judges.*

The petition for rehearing filed by Milton Berger and Ruth K. Berger (Deceased), Joseph Yovanovich and Anna Yovanovich, and Pennsylvania Papyrus Corporation, Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

FREEDMAN, *Judge*

Dated: December 26, 1968.